The Commission's reliance on collocation facilities was reasonable. The Commission found (and MCI does not dispute) that "competitors incur considerable expense to establish an operational collocation arrangement." *Order*, ¶ 81 (JA 276). In addition to the significant financial outlays necessary to establish collocation facilities, competitors spend substantial time and resources to negotiate collocation agreements. *Id.* Competitors go to this expense and expend these resources for the purpose of providing competitive service. Looking to the presence of collocation arrangements, moreover, represents a reliable and relatively simple way to evaluate whether competitive pressures exist. *Order*, ¶ 84 (JA 277-78). The Commission found that other potential indicators of competition – such as satisfaction of an extensive checklist modeled on section 271 of the Act, 47 U.S.C. § 271(c)(2)(B), which governs BOC entry into long distance service -- are costly and difficult to verify and not necessary to the task at hand. *Id.*

MCI contends that the existence of collocation arrangements in itself does not demonstrate that there is significant competition. MCI's argument is inapposite because it equates competitive pressure with market share. But the Commission did not conclude that a loss of market share was necessary to constrain an ILEC's prices. To the contrary, the Commission found that the presence of substantial sunk investment by a competitor imposes restraints on anticompetitive behavior. The Commission noted:

> Another firm can buy the facilities at a price that reflects expected future earnings and, as long as it can charge a price that covers average variable cost, will be able to compete with the incumbent LEC. In telecommunications, where variable costs are a small fraction of total costs, the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed.

Order, ¶ 80 (JA 274-75).[26] The Commission reasonably relied on the economic principle that an incumbent monopolist's ability to set unreasonable prices is constrained if competitors can readily enter the market without incurring additional costs. *See Order* ¶¶ 79-80 (*citing in support, e.g.*, S. Martin, INDUSTRIAL ECONOMICS: ECONOMIC ANALYSIS AND PUBLIC POLICY 414-15 (1998)). *See also* Areeda, Hovenkamp & Solow, IIA, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 160-61 (1995); Landes and Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 950 (1981); Baumol, Panzer & Willig, *Contestable Markets and The Theory of Industry Structure* 292 (1982) (if a market is subject to costless reversible entry, an incumbent will charge market rates even if it is a monopolist).

2. MCI contends that, even if there is some competition in the market for entrance facilities (the connection between the serving wire center and the IXC's POP), there is no competition for interoffice transport (the connection between the LEC's end office and the serving wire center). MCI thus argues that the Commission should have established different triggers for entrance facilities and interoffice transport. MCI's argument ignores the fact that wire centers include end offices as well as serving wire centers, and in fact, the vast majority of wire centers *are* end offices.[27] In addition, evidence in the record before the Commission

[26] MCI's reference to the Commission's decision in *Implementation of the Local Competition Provisions of the 1996 Act*, Third Report and Order, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*) is not on point. *See* MCI Br. at 30. As the Commission noted, the Commission's determination that new local service providers need access to unbundled transport was different from (and not inconsistent with) its determination here that, once competitors have established a significant market presence marked by collocated facilities, the Commission should allow pricing flexibility. *UNE Remand Order*, 15 FCC Rcd at 3849 n. 673 ("Competition evidenced by the satisfaction of certain triggers, to the extent they are met, does not demonstrate that a requesting carrier is not impaired without access to unbundled dedicated transport"). Indeed, ensuring unfettered entry into the local exchange market through the use of unbundled elements goes hand-in-hand with the need to allow ILECs to meet competition as it develops.

[27] Serving wire centers may themselves serve as end offices.

showed that collocation in serving wire centers was only a fraction of all collocated facilities within an MSA. *See, e.g.*, May 27, 1999 Ex Parte from Kenneth Rust, director, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC (JA 221, 229) (maps delineating collocation in serving wire centers and other wire centers). The Commission's decision not to distinguish between interoffice transport and entrance facilities for purposes of quantifying collocation arrangements was reasonable. *See United States v. FCC*, 652 F.2d 72, 93-94 (D.C. Cir. 1980) (it is within Commission's authority as expert agency to determine relevant market for purposes of evaluating competition); *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1492 (D.C. Cir. 1995).

3. MCI makes a similar argument regarding the Commission's decision to allow pricing flexibility for "channel termination" facilities used to provide service between the end office and the customer premises. MCI argues that carriers are more likely to deploy transport facilities at entrance facilities than between the end office and the customer premises. The Commission recognized that collocation arrangements at the end office that connect the end office and the customer premises do not represent the same competitive threat to the ILEC as collocation arrangements used to connect the end office and the serving wire center, which carry traffic from one point of traffic concentration to another. *Order*, ¶ 102 (JA 288). The Commission addressed

this by requiring a substantially higher demonstration of collocation for an ILEC to qualify for pricing flexibility for channel terminations between the end office and the customer premises.[28]

MCI argues that the Commission's triggers would provide pricing flexibility for channel termination even if there were no competitive facilities used to connect the end office and the customer premises. The Commission recognized and responded to this concern. *Order*, ¶ 103 (JA 289). The Commission nevertheless concluded that the presence of competitive collocation facilities was the most reliable indicator of competition, including between the end office and customer premises. Moreover, the Commission reasoned that, because competitors have an incentive to extend their facilities all the way to customer premises, it was likely that some of the sunk investment in collocation facilities was used for channel terminations between end offices and customer premises. *Order*, ¶ 104 (JA 289-90). The Commission found that, to the extent that competitors were leasing unbundled loops from the ILEC to reach customers, this was most likely transitional. *Id.*

The Commission found that there was no reliable way to measure actual competition, such as by measuring market share or competitors' revenues from channel termination, because those data were not available. *Id.* The petitioners do not assert otherwise.[29] The Commission

[28] To obtain Phase I pricing flexibility for channel terminations, ILECs must show that competitors have collocated in at least 50 percent of the wire centers in the MSA, or in wire centers accounting for at least 65 percent of the ILEC's revenues from those services. 47 C.F.R. § 69.711(b). To obtain Phase II pricing flexibility, ILECs must show that competitors have collocated in at least 65 percent of of the wire centers in the MSA, or in wire centers accounting for at least 85 percent of the ILEC's revenues from those services. 47 C.F.R. § 69.711(c). In addition, at least one collocator in each of the wire centers relied on by the ILEC in its petition must be using transport facilities owned by an entity other than the ILEC. 47 C.F.R. § 69.711(b) and (c).

[29] AT&T acknowledged that there is no way, currently, to accomplish its proposal to measure competitors' revenues. *Order*, ¶ 103 (JA 289).

was not required to delay making a decision until it had obtained such information. As the Court has stated, "Someone must decide when enough data is enough. In the first instance, that decision must be made by the Commission . . . not by parties to the proceeding and not by the courts. . . . To allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay." *United States v. FCC*, 652 F.2d at 90-91.

4. The Commission reasonably determined that, in addition to considering whether competitors had collocated in a certain percentage of wire centers within the MSA, it could, alternatively, consider whether competitors had collocated in wire centers accounting for a certain level of the ILEC's revenues within the MSA. The Commission concluded that "collocation in wire centers representing a significant percentage of incumbent LEC revenues from a particular service also indicates meaningful investment by competitors." *Order* ¶ 97 (JA 286). As the Commission recognized, "competitors are drawn to new markets by the prospect of earning revenues...." *Order* ¶ 87 (JA 280). Thus, in determining whether there is a competitive presence that will constrain the ILEC's ability to charge unreasonable prices, it is significant that competitive facilities exist in revenue-generating portions of the serving area.[30] MCI argues that looking at the ILEC's revenues ignores whether competitors have a substantial market share. MCI Br. at 31-32. MCI once again misses the point: the Commission did not purport to determine whether competitors had captured a certain portion of the market, but rather whether there exists a competitive presence significant enough to constrain abusive pricing practices. If

[30] The Commission set a higher threshold for the revenue-based trigger to account for the fact that in some areas, a small number of wire centers may account for a large portion of revenues, and "to ensure that competitors have extended their networks beyond a few revenue-intensive wire centers." *Order* ¶ 98 (JA 286).

competitors are poised to compete for a significant portion of the ILEC's revenues, the ILEC has disincentives to charge unreasonable prices.

5. MCI argues that the Commission improperly included unbundled network elements in evaluating whether there is a sufficient level of competitive facilities to warrant pricing flexibility for common-line and traffic-sensitive services. Competitors must provide their own transport and switching in order to satisfy the pricing flexibility triggers for common line and traffic-sensitive services. *Order*, ¶¶ 111-113 (JA 292-93). Thus, ILECs will not be granted pricing flexibility unless competitors have made sunk investment. Where competitors use their own transport and switching, however, the fact that they also may lease unbundled loops from the ILEC does not disqualify those competitive facilities from being included for purposes of determining whether the pricing flexibility triggers are satisfied. This decision is consistent with the Commission's determination that, in deciding whether to grant pricing flexibility, it should look at whether competitors have sunk investment in facilities. *Order*, ¶ 111 (JA 292).[31]

6. MCI notes that, in order to qualify for Phase I or Phase II relief, an ILEC must show that at least one competitor is relying on transport facilities provided by an entity other than the ILEC. The Commission imposed this requirement to provide additional assurance that each wire center relied on by the ILEC in its pricing flexibility petition has competitive transport facilities. *Order* ¶ 82 (JA 276-77). MCI argues that, by not imposing any capacity requirements, an ILEC might qualify for pricing flexibility even if there are "competitors possessing facilities that are

[31] MCI ignores the fact that to qualify for pricing flexibility for common line and traffic-sensitive services, competitors must "actually offer" these services to 15 percent of an ILEC's customer locations within the MSA. *Order* ¶ 120 (JA 296). Thus, the trigger for these services differs from the trigger for special and dedicated transport services, which only requires the ILEC to show that competitors have collocated in 15 percent of the MSA's wire centers.

capable of serving only a small fraction of the customers in that wire center...." MCI Br. at 31. MCI's argument is without merit. The technological advances in fiber and electronics have made expansion of transport capacity relatively inexpensive. *See, e.g., Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 81063 (¶ 64) (1998). Once a competitor has infrastructure in place, the marginal cost of adding customers is not significant, and competitors are not likely to lack sufficient capacity for an extended period. *See, e.g.,* Mitchell and Vogelsang, *Telecommunications Pricing: Theory and Practice* 14 (1991).

D. The Commission's Selection of Particular Triggers Was Reasonable.

The Commission recognized that establishing specific collocation triggers was a policy determination rather than a scientific endeavor. *Order* ¶ 96 (JA 286). The Commission made a reasonable judgment on the basis of evidence before it. *Association of Oil Pipelines v. FERC*, 83 F.3d 1424, 1436 (D.C. Cir. 1996) (Commission is entitled to deference where it considered the options and articulated the reasons for its decision). This Court has said that it is "generally 'unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem.'" *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977)). The Commission's triggers bear a clear relationship to the underlying regulatory problem. Moreover, the Court has held that, in reviewing a numerical standard, the question is "whether the agency's numbers are within a 'zone of reasonableness,' not whether its numbers are precisely right." *Hercules, Inc. v. EPA*, 598 F.2d 91, 107-08 (D.C. Cir. 1978).

The collocation triggers are of a predictive nature: they rest on a prediction that a certain amount of collocation will be sufficient to constrain monopoly pricing practices by ILECs. Courts have repeatedly refused to strike down such predictive judgments on the grounds that they are imprecise or lack extensive support in the record. As the Supreme Court has said, "In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978) (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)). *Accord, FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-95 (1980); *NARUC v. FCC*, 737 F.2d at 1117. In *NARUC*, this Court held that the Commission was not required to delay implementing a regulatory response until the anticipated concern – in that case, uneconomic bypass – had "matured as a market-place force to be reckoned with." 737 F.2d at 1116.

The Commission determined that, to obtain Phase I pricing flexibility, competitors needed to have made "irreversible investments in facilities" within the MSA. *Order* ¶ 77 (JA 272). The Commission considered the investments associated with negotiating collocation agreements and establishing collocation facilities, and concluded that, if competitors had made such investments in at least 15 percent of the wire centers within the MSA, that constituted "irreversible investment." *Order* ¶ 81 (JA 275-76).[32] The Commission noted that record evidence indicated that, where there was collocation in 15 percent of the wire centers in an MSA, competitors had installed a substantial amount of competitive transport facilities. *Order* ¶ 95 (JA 284-85). The Commission also found that collocation is likely to underestimate the amount of competitive facilities because it ignores competition that completely bypasses the ILEC's facilities. *Order* ¶¶ 95, 109 (JA 284-85, 291-92).[33]

The Commission was well aware that different parties were advocating different methods of measuring competitive entry. For example, the Commission stated that it was setting its Phase I collocation trigger at 15 percent (less than the level advocated by IXCs and some ILECs) because Phase I would offer less extensive relief than the relief proposed in the ILECs' comments. *Order* ¶¶ 94-95 (JA 284-85). *See also Order* ¶ 117 (JA 295). Moreover, the Commission rejected the ILECs' proposal that triggers be determined on the basis of the percentage of demand that was "addressable" by competitors. This would have included competition provided using collocation, unbundled network elements, or the presence of competitive facilities anywhere in the wire center (*i.e.*, total bypass). The Commission rejected

[32] The Commission noted that a single collocation arrangement could exceed $300,000. *Order* ¶ 81 (JA 276). The Commission refused to include resale and unbundled network elements in its trigger because those methods of competitive entry do not require substantial sunk investment. *Order* ¶ 88 (JA 280-81).

[33] The Phase I trigger for common line and traffic-sensitive access services does take into account competitors that have bypassed the ILEC's facilities. *Order* ¶ 110 (JA 292). The Commission noted that competition for these services is relatively new, and that, in contrast to dedicated transport and special access, the Commission did not have a history upon which to predict entry methods for switched services. *Order* n.319 (JA 296). The Commission thus decided that, because total bypass may be a key method of entry in the switched access service markets, it could not ignore such entry methods for purposes of evaluating whether the trigger had been satisfied. *Order* ¶ 119 (JA 295-96).

suggestions that it include unbundled network elements and resold services in calculating the degree of competitive entry because, it concluded, those facilities did not represent substantial sunk investment. *See, e.g., Order* ¶ 88 (JA 280-81). The Commission rejected proposals to include competition that bypassed the ILEC's facilities because there was no reliable method to measure such competitive activity. *Order* ¶¶ 95, 104 (JA 284-85, 289-90).

The Commission determined that, to obtain Phase II pricing flexibility, IXCs should have a competitive alternative for dedicated services to reach "the majority" of their long distance customers in the MSA and that "almost all" special access customers should have a competitive alternative. *Order* ¶ 142 (JA 306). The Commission's triggers are consistent with this determination.

To obtain Phase II pricing flexibility (other than for channel terminations), an ILEC must demonstrate that competitors have established collocation facilities in 50 percent of wire centers in the MSA or in wire centers comprising 65 percent of the ILEC's revenues for the services for which pricing flexibility is sought. For channel terminations, the triggers are 65 percent and 85 percent, respectively. As in Phase I, the Commission noted that these triggers do not account for competitive carriers that bypass the ILEC's facilities completely. *Order* ¶ 148 (JA 308). Competitive providers have been offering special access service over their own facilities for many years. *See, e.g., Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7373 ¶ 4 and n.5 (competitive access providers have deployed their own facilities to provide "significant amounts of high capacity special access traffic in certain urban areas"). Thus, the amount of competitive facilities for special access that is not reflected in the collocation triggers may be significant, especially in certain areas.[34]

MCI asserts that ILECs have said they can immediately qualify for Phase I pricing flexibility in 45 of the 50 largest MSAs and Phase II pricing flexibility in 35 of the 50 largest MSAs – as if that were an indictment of the triggers. MCI Br. at 21, 41-42. In the first place, that claim is unverified: No carrier has petitioned yet for Phase I or Phase II pricing flexibility. More importantly, the fact that there may be substantial levels of competitive facilities in the largest urban areas hardly proves that the Commission's standard was erroneous. In fact, it suggests that the triggers are most likely to be satisfied initially in large urban areas, where competition would be expected to develop first.

III. THE DECISION TO GRANT PRICING FLEXIBILITY ON AN MSA-WIDE BASIS WAS REASONABLE.

The Commission evaluated the record and determined that petitions for pricing flexibility should be decided on an MSA basis.[35] The Commission found that "MSAs best reflect the scope of competitive entry." *Order* ¶ 72 (JA 270). The Commission explained its reasons for not selecting a larger or a smaller geographic area. *Order* ¶¶ 72-75 (JA 270-71). That decision is entitled to deference. *Association of Oil Pipelines v. FERC*, 83 F.3d at 1436; *Indiana Municipal Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995). In particular, the Commission found that granting pricing flexibility in geographic areas smaller than MSAs, such as individual wire centers, would require incumbents to file many additional pricing flexibility petitions and that

[34] In addition, the Commission observed that these triggers correlated to a substantial amount of fiber deployment. *Order* ¶ 148 (JA 308-09).

[35] The Commission found that pricing flexibility petitions for areas that are not included in an MSA should be decided on a study area basis. *Order* ¶ 76 (JA 271). MCI does raise any object to that determination.

"the record does not suggest that this level of detail justifies the increased expenses and administrative burdens associated with these proposals." *Order* ¶ 74 (JA 271). MCI does not offer any evidence to suggest that that decision was unreasonable.

MCI contends that the decision to grant pricing flexibility on an MSA-wide basis "will grant the LEC dramatic pricing flexibility *throughout* the MSA," including areas where the ILEC does not face competition. MCI Br. at 33 (emphasis in original). First, as noted above, the pricing flexibility offered under Phase I merely allows the ILEC to offer lower rates via contract tariffs and volume and term discounts. Indeed, the biggest beneficiaries of this deregulatory measure will likely be customers in portions of the MSA that do *not* otherwise have competitive options. This is because ILECs must make the terms of contract tariffs available to similarly situated customers, and make volume and term discounts available nondiscriminatorily Second, if a carrier qualifies for Phase II relief, there necessarily will be competitive facilities located throughout much of the MSA. The Commission found that the triggers it adopted were adequate to justify the particular degree of pricing flexibility that would be granted if the triggers are satisfied. *Order* ¶ 74 (JA 271). To the extent that competition in a portion of the MSA causes the ILEC to reduce rates, customers *throughout* the MSA will benefit because the ILEC must make those rates available either through general tariff schedules or through contract tariffs that are available to similarly-situated customers.

The Commission recognized that granting regulatory relief on an MSA-wide basis might give ILECs pricing flexibility for portions of an MSA that did not have a competitive presence. *Order* ¶ 142. (JA 306). The Commission concluded, however, that it was not possible as a practical matter to "time the grant of regulatory relief to coincide precisely with the advent of competitive alternatives for access to each individual end user." *Order* ¶ 144 (JA 307). The

Commission also noted that the purchasers of special access and dedicated transport services (services for which Phase II relief is potentially available) are primarily IXCs and large businesses that have some bargaining power with respect to the ILEC, even in the absence of competitive pressure throughout the MSA. *Order* ¶ 142 (JA 306). The Commission reasonably balanced the need for a practical method of reviewing pricing flexibility petitions and the need to protect consumers from market power abuses.

IV. THE COMMISSION'S DECISION TO EASE ITS REGULATION OF NEW SERVICE OFFERINGS AND RATE AVERAGING WAS REASONABLE.

A. New Services

The Commission immediately allowed ILECs to offer new services to consumers without making time-consuming public interest demonstrations and cost showings. *Order*, ¶¶ 37-44 (JA 250-54). The Commission found that its pre-existing requirements "clearly delay the introduction of new services," and that new services, by definition, expand the range of choices available to consumers. *Order*, ¶ 37 (JA 250). Retaining significant constraints on ILECs' ability to offer new services "can place price cap LECs at a competitive disadvantage," and this in turn could further harm consumers by "diminishing the incumbent's incentives to develop and offer new services." *Order*, ¶ 38 (JA 251).

The Commission pointed out that consumers would not be harmed by the relaxed regulation of new services because the services already offered by the ILEC would continue to be available and subject to regulatory constraints. *Order*, ¶ 37 (JA 251-52). Customers may continue to rely on the existing, price cap services. *Order*, ¶ 40 (JA 252). The Commission also noted that ILECs would continue to be prohibited, under section 202, from engaging in unreasonable discrimination, and that complaints could be brought pursuant to section 208. *Order* ¶ 41 (JA 252).

The Commission refused to amend its rules to "permit price cap LECs to offer new services outside of price cap regulation...." *Order*, ¶ 43 (JA 253). Although the Commission permitted ILECs to introduce new services on a streamlined basis, it required new services to be incorporated into the appropriate price cap basket. MCI concedes that, once the new services are included in price caps, ILECs will be constrained in raising rates for those services. MCI Br. at 48. MCI contends, however, that there is no protection against an ILEC's offering new services at unreasonable rates at the outset. *Id.* Moreover, MCI claims, the ability to introduce new services at unregulated rates may enable price cap LECs to raise the prices of other services once the new services are brought within price caps. *Id.*

MCI's concerns are unfounded. The price cap rules have always provided that rates for new services be established outside of price cap baskets in order to establish demand levels and associated revenue weights before they are incorporated into price caps. *Order* ¶ 35 (JA 249). If a carrier initially offers a new service at an unreasonably high rate, there will be little demand for that service. Under price cap rules, a carrier may adjust the prices of services within a group or "basket" of services so long as, calculated on a revenue-weighted average basis, the charges do not exceed the basket's aggregate "cap." *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 178, 181-82 (D.C. Cir. 1993). If the new service is priced too high, it will enter price cap regulation with little revenue weight, and will not give the ILEC significant ability to adjust rates for other price cap services.[36] Thus, contrary to MCI's claims, the requirement that new services be incorporated into price caps provides significant assurance that rates for new services will not be unreasonable even at the outset.

B. Geographic Deaveraging

The Commission immediately expanded the ability of ILECs to deaverage their rates for trunking basket services. Previously, the FCC had permitted ILECs to charge geographically deaveraged rates, but "LECs seeking to establish more than three zones" within a study area were subject to increased scrutiny and had to "carefully justify" those pricing zones. *Order*, ¶ 58 (citing *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7454 n.413) (JA 262). In its pricing flexibility decision, the Commission gave LECs additional flexibility to deaverage rates. The Commission permitted price cap LECs to deaverage rates for access service in the trunking basket, without requiring the LECs to demonstrate that the zones reflect cost differences, as long as each zone except the highest-cost zone accounts for at least 15 percent of the ILEC's trunking basket revenues in the study area. *Order*, ¶ 59 (JA 263).

The Commission has long believed that averaged rates "might create a pricing umbrella for competitors that would deprive customers of the benefits of more vigorous competition." *Order* ¶ 60 (JA 263). The Commission recognized that non-cost-based, geographically averaged rates cannot be maintained as competition develops. *Id.* The Commission found that deaveraged rates promote efficiency, and it agreed with ILECs that the increased scrutiny imposed on pricing

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[36] Moreover, because new services must eventually be included in price caps, an ILEC has little incentive to offer new services at unreasonably low (*i.e.*, predatory) rates, because when the new service is included in price caps, the carrier will not be able to continue to offer the new service at the predatory rate over a long period of time, and it cannot increase rates for that new service unless it lowers rates for other services.

plans that exceed three zones discourages carriers from offering deaveraged rates. *Id.* Further, the Commission agreed with ILECs that the zones in most density pricing plans were too large to be of practical value. *Id.* The Commission thus allowed ILECs to decide for themselves appropriate pricing zones. *Order* ¶¶ 61-62 (JA 264-65). The Commission concluded that the 15 percent revenue threshold requirement it imposed would ensure "that incumbent LECs cannot define zones that are, for all practical purposes, specific to particular customers." *Order*, ¶ 62 (JA 264).

MCI claims that the Commission provided "no safeguard against a price cap LEC drastically reducing prices in the zones where competition is most developed, and raising [its] prices accordingly in the zones that have no competition." MCI Br. at 49. The *Order* limits annual price increases within pricing zones to 15 percent. *Order*, ¶ 63 (JA 265-66); 47 C.F.R. § 61.47.[37] In addition, annual increases within the study area are limited to 5 percent. *Order* n. 171 (JA 265). These restrictions ensure that ILECs do not "drastically" increase or reduce rates. The Commission found that these limits on rate increases and decreases would prevent rate shock, but, at the same time, allow more rapid movement toward cost-based rates. *Order*, ¶ 63 (JA 265-66).

Moreover, the Commission specifically designed its rules to prevent ILECs from establishing rates designed to respond to specific, limited pockets of competition. The Commission concluded that, because each pricing zone except the highest cost zone must generate at least 15 percent of the ILEC's revenues for the relevant services, an ILEC could not effectively target its rate reductions to narrow areas to respond to competitive entry. *Order* ¶ 62

[37] Previously, carriers could increase rates within a zone by five percent annually.

(JA 264). The 15 percent revenue threshold severely constrains any attempt at predatory pricing, because an ILEC could not afford to price below cost throughout the entire rate zone. *Order* ¶ 63 (JA 265-66). Finally, parties may challenge the reasonableness of zone pricing plans as part of the Commission's tariff review or complaint processes. *Order*, ¶ 65 (JA 266-67).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted.

CHRISTOPHER J. WRIGHT
GENERAL COUNSEL

JOHN E. INGLE
DEPUTY ASSOCIATE GENERAL COUNSEL

LISA S. GELB
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

July 20, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MCI WORLDCOM, INC., ET AL., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)))))))))	NO. 99-1395 (AND CONSOLIDATED CASES)

CERTIFICATE OF COMPLIANCE

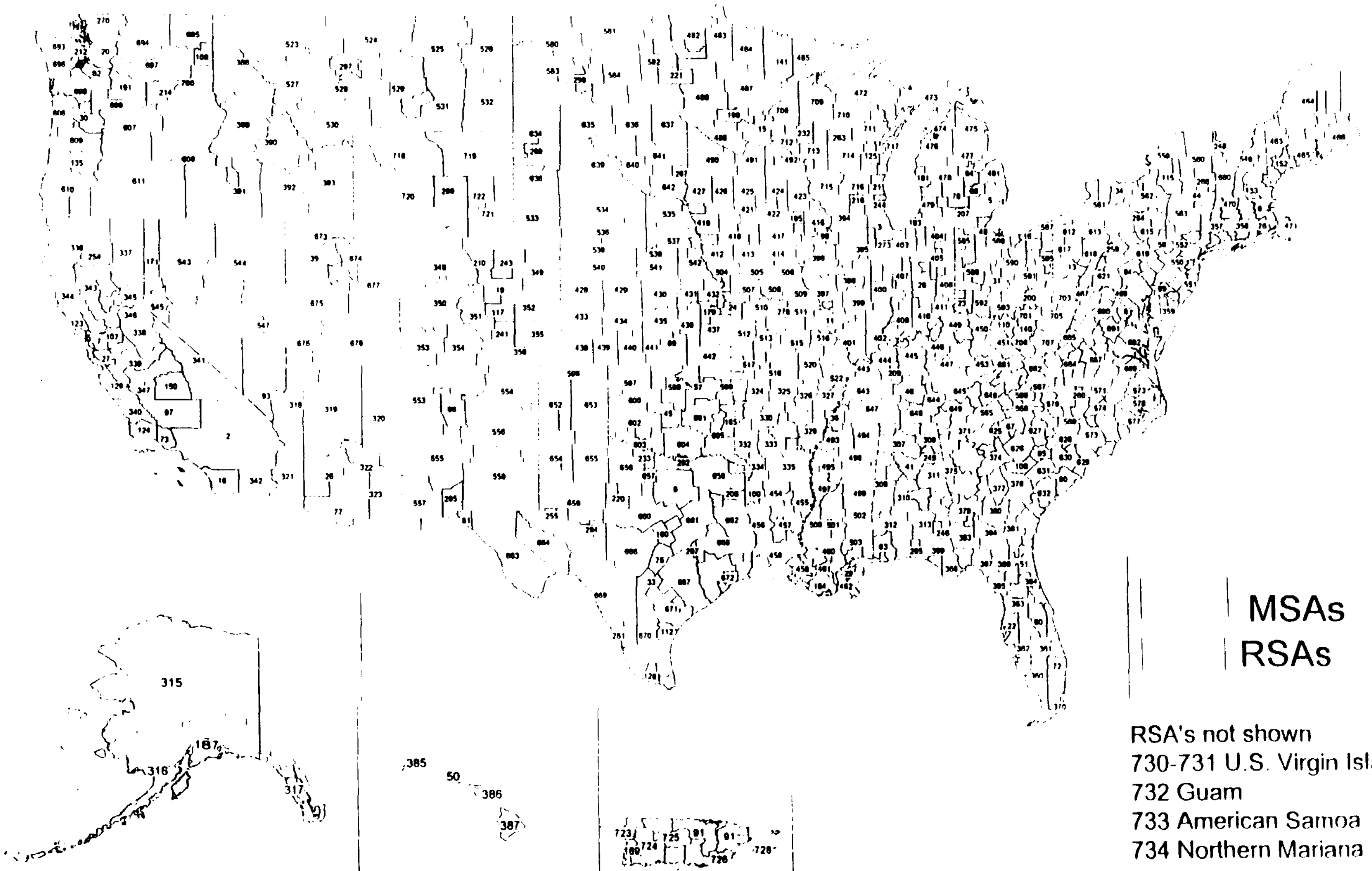
Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Federal Communications Commission" in the captioned case contains 13919 words.

LISA S. GELB
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

September 8, 2000

APPENDIX 1

Metropolitan Statistical Areas and Rural Service Areas



RSA's not shown
730-731 U.S. Virgin Islands
732 Guam
733 American Samoa
734 Northern Mariana Isl.

Note: Due to the size and the quantity of RSA's and MSA's not all numbers appear

STATUTORY APPENDIX

Contents:

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

Current through P.L. 106-180, approved 3-17-2000

§ **153**. Definitions

For the purposes of this chapter, unless the context otherwise requires--

* * *

(15) Dialing parity

The term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).

§ **161**. Regulatory reform

(a) Biennial review of regulations

In every even-numbered year (beginning with 1998), the Commission--

(1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and

(2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

(b) Effect of determination

The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

§ **204**. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

§ **206**. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

§ **207.** Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

§ **208**. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

§ 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.